

U.S. SUPREME COURT
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THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM 1948

No. 747

STANDARD BRANDS, INCORPORATED and
CAMPBELL SOUP COMPANY, Successor
thereto and Intervening Plaintiff,
Petitioners,

vs.

EASTERN SHORE CANNING COMPANY,
INCORPORATED,
Respondent.

BRIEF OF EASTERN SHORE CANNING COMPANY,
INCORPORATED, IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

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FACTS

This is a suit for infringement and unfair competition brought by Standard Brands Incorporated against East-

ern Shore Canning Company, Incorporated. The alleged infringement and unfair competition concerned the use by the defendant of the trade-mark VA on tomato juice and lima beans. Standard Brands Incorporated contended that this was an infringement of its mark V-8 used on cocktail vegetable juices.

The District Court of the United States for the Eastern District of Virginia, after a trial and oral argument of counsel, supplemented by briefs, decided that there was no infringement or unfair competition. The basis of the decision was that the marks themselves were not sufficiently alike either in appearance or meaning to cause confusion; that even in sound there was no resemblance unless the mark VA were slurringly pronounced "V-ay", and there was no evidence that the mark was pronounced in this manner; that since VA was the customary and well-known abbreviation for the State of Virginia, there was every reason to expect that the mark was pronounced "Virginia", in which event there was no resemblance even in sound.

The Court of Appeals for the Fourth Circuit affirmed this decision of the District Court, and it is from this action on the part of the Circuit Court that the petitioner asks a writ.

Petitioner had no knowledge of the use by Eastern Shore Canning Company of the mark VA until October, 1945, although Eastern Shore had used the mark since October 1941 on its lima beans, and on its tomato juice since July, 1944, in a business operated less than one hundred miles from two of petitioner's agency offices at Norfolk and Newport News. Actually, petitioner learned of the use of the mark on lima beans by means of a letter from Eastern Shore's attorneys dated February 13, 1946. (R. 16)

Petitioner does not sell lima beans or tomato juice under the trade-mark V-8, but does sell frozen lima beans and tomato juice under marks other than V-8. (R. 16)

ARGUMENT

- I. *There Is No Conflict between the Decisions of the Court of Appeals for the Fourth Circuit in the Instant Case and that of the Court of Appeals for the Second Circuit in the Smidler Case because the Cases Were Decided on Totally Different Facts.*

Appellant argues that there is a conflict between the decisions of the Court of Appeals for the Fourth Circuit in the instant case (172 F(2) 144) and the decision of the Court of Appeals for the Second Circuit in the case of *Standard Brands v. Smidler*, 151 F(2) 34, and it invokes this alleged conflict as a reason for this court's considering this case.

Let us first consider the points at issue in the two cases:

In the Smidler case, Standard Brands, Inc., the owner of the trade-mark V-8 for a combination of vegetable juices, sued the defendant Smidler who used *the identical mark* V-8 on vitamin tablets.

The court held that the defendant had infringed the plaintiff's trade-mark, and that the fact that the products upon which the identical mark was used were different, did not prevent confusion of source.

In the instant case the Court of Appeals for the Fourth Circuit had before it an entirely different question. Standard Brands has sued Eastern Shore Canning

Company for the alleged infringement of its trade-mark V-8 used on cocktail juices by the defendant's use of VA on tomato juice and lima beans. It also has alleged unfair competition.

In the Smidler case the Court of Appeals for the Second Circuit decided that the defendant, by using the same mark as the plaintiff, namely, V-8, had infringed defendant's identical mark used on a different product. In the instant case the Court of Appeals for the Fourth Circuit has decided that the trademark VA did not infringe the trademark V-8 because the two marks were so different in appearance, meaning and sound, that no likelihood of confusion existed.

It, therefore, is perfectly apparent that the decisions of the two courts are not in conflict.

The situation is not as it was in the case of *Hanover Star Milling Co. v. Metcalf* and *Allen Wheeler Co. v. Hanover Star Milling Co.* 240 U. S. 403 cited by the petitioner in page 10 of its brief.

In the Hanover case two district courts in different circuits granted temporary injunctions, and both circuit courts reversed upon grounds that went to the merits and raised fundamental questions regarding the same trademark. In this situation writs of *certiorari* were granted before final decrees, despite the general rule to the contrary.

The trademark "Tea Rose" was involved in both cases. In the Fifth Circuit the District Court granted an injunction against Metcalf, restraining him from selling flour under the name "Tea Rose". The Circuit Court reversed this decree and remanded the cause with directions to dismiss the bill.

In the Seventh Circuit the District Court granted an order restraining Hanover from using the same mark

"Tea Rose" on the sale of his flour, and the Circuit Court reversed this decree and remanded the cause for further proceedings not inconsistent with its opinion.

Very properly this Court granted the writs of *certiorara* saying that the lower courts "differed upon fundamental questions."

But no such difference exists in the situation presented to this Court by the application for a writ of *certiorari* in the instant case.

The decisions of the Court of Appeals for the Second Circuit in the Smidler case, and that of the Court of Appeals for the Fourth Circuit in the instant case, certainly do not conflict in final result for the very simple reason that they concern entirely different subject matter. In the former the court decided that the use of an identical trademark V-8 on vitamin tablets was an infringement on its use on a vegetable cocktail juice. In the latter the court decided that the use of the mark VA on lima beans and tomato juice did not infringe the use of the mark V-8 on vegetable cocktail juices, because the marks were not similar enough to cause confusion.

If the Fourth Circuit had had before it the question involved in the Smidler case, there is nothing in its opinion in the instant case to indicate that it would have decided the Smidler case differently than it was decided by the Second Circuit. And had the Second Circuit been faced with the questions involved in the instant case, there is no reason to believe that it would have decided them differently than the Fourth Circuit has.

The fact is that the two circuit courts were faced with two entirely different questions, and for this reason there could be no conflict in their decisions.

In such a situation this Court does not grant writ of *certiorari*. There is no reason for it to do so.

As is said in "*Jurisdiction of the Supreme Court of the United States*" by Robertson and Kirkham, at page 609:

"But the conflict must be real, and a writ granted because of an asserted conflict, will suffer dismissal as improvidently granted if, after argument, it appears that the asserted conflict in decisions arises from a difference in states of fact and not in the application of a principle of law."

Wisconsin Electric Co. v. Dunmore Co. 282 U. S. 813, 51 Sup. Ct. 214, 75 Led. 728.

But petitioner, despite the fact that these two cases were decided on totally different sets of facts, insists that there have been different applications of trademark principles by the two courts in reaching their decisions.

For example, on page 11 of its brief, petitioner asserts that the Second Circuit has held that the V-8 trademark rights extended to include in its coverage vitamin tablets, and that the Fourth Circuit has held that the V-8 mark did not extend to cover tomato juice or lima beans.

But the Fourth Circuit has decided no such thing. It has merely decided that the VA mark is not sufficiently like the V-8 mark to furnish any likelihood of confusion. Having reached this conclusion, as both it and the District Court very definitely did, there was no necessity for it to go any further. The matter was ended.

The Court of Appeals for the Fourth Circuit quoted the District Court's opinion with approval as follows:

"There is a marked difference in the appearance of the labels and trademarks used by the respective parties, including their background, their coloring, and the arrangement of the printed matter thereon. Even the letters, or symbols, V-8 and VA, as printed on the labels, are decidedly unlike both in form and coloring." (R. 40)

And again:

"The difference in appearance is such as to offer no suggestion that the products to which they are attached are from the same source or are put up by the same packer." (R. 41)

On the question of alleged phonetic similarity appellant insisted in the lower courts that there was such a similarity. The District Court in its findings of fact number 4 (R. 32) said:

"The only element of similarity between the trademarks V-8 and VA is in a similarity of sound when the terms are not distinctly articulated and this similarity rests on the assumption that defendant's products are referred to as the VA (vee-ay) brand instead of by the name Virginia, for which the letters VA are the accepted abbreviation. There is no evidence that defendant's products are customarily referred to as VA (vee-ay) brand * * *

It was on this ground of dissimilarity of the marks themselves, that the lower courts based their decisions. Had petitioner completed the quotation from the

Fourth Circuit's opinion at the bottom of page 11 of its brief, upon which it relies to prove that the court was deciding that the V-8 trade-mark did not extend to tomato juice and lima beans, the real meaning of the court would have been plain. The excerpt completed reads as follows:

"It is significant, as pointed out in his opinion, that V-8, as used by the plaintiff, has become associated in the public mind with a specific combination of vegetable juices; that defendant does not manufacture this product and has used its accused mark only on products which no one would mistake for the combination; and that the letters VA are customarily used as an abbreviation of the name of the state in which the defendant produces and distributes its goods, and when used in connection with defendant's name, which includes the well-known designation of a geographical subdivision of the state, would be understood as indicating the territorial origin of the product rather than the goods of a corporation of nation wide fame." (R. 42)

All that the Fourth Circuit means by this language is that all of the surrounding circumstances only confirm its decision that not only are the marks dissimilar but also the use of the marks would not tend to cause confusion.

It was pertinent to consider the use to which the mark was put because this was a suit for unfair competition as well as infringement, as we will later discuss in detail.

As pointed out by the petitioner at the top of page 12 of its brief, the Fourth Circuit clearly stated the

established Federal law on the subject as follows:

"And it is also well established that the protection which the law gives to the owner of a trade-mark is not confined to the goods upon which it has been used by the owner, but extends to products which would be reasonably thought by the buying public to come from the same source if sold under a similar mark. *Standard Brands, Inc. v. Smidler*, 2 Cir., 151 F. 2d 34, 36; *Restatement of Torts*, section 728, Comment c, section 730." (R. 42)

But it did not, as petitioner asserts, misapply that law.

It based its decision mainly on dissimilarity of the marks, but it said:

"Nevertheless, it must be borne in mind that all of the factors which enter into a case of trade-mark infringement are to be considered in determining the crucial question whether the defendant's actions are likely to lead an appreciable number of prospective purchasers to regard its goods as coming from the same source as plaintiff's, and that this question must be left to the determination of the trier of fact. *Restatement of Torts*, section 728, Comment a." (R. 42)

Petitioner argues that the reason infringement was found in the *Smidler* case and not found in the instant case is that the Fourth Circuit did not recognize that the gist of appellant's action was "confusion not as to the kind of product but as to the source of the product."

Petitioner insists on this, despite the quotation given above in which the Fourth Circuit clearly recognized that the petitioner was entitled to protection not only as to goods but as to source as well.

What petitioner refuses flatly to admit is that the action of the Fourth Circuit rests on the firm foundation of lack of similarity in the marks. This is the explanation as to why it found no infringement. The Second Circuit found infringement because the marks were identical.

We respectfully submit that there is no conflict between the two cases mentioned; that they are decided on totally different subject matter; that the Fourth Circuit has decided one question, and the Second Circuit another; that the Fourth Circuit has decided that there is not sufficient similarity between the marks V-8 and VA to cause confusion; that this question never came before the Second Circuit; and that even on the reasoning there is little or no conflict; that the Fourth Circuit has clearly recognized the principle of law that there may be confusion of source even though the marks are used on different products; and that its discussion as to the use of the marks on different products was merely ancillary to its primary decision that the marks themselves were different, and in addition was pertinent in disposing of unfair competition.

II. The Court of Appeals for the Fourth Circuit Has Not Decided Any Novel or Important Questions and the Quotations Relied upon by Petitioner Do Not Indicate Any Such Decision.

Petitioner argues that the Court of Appeals has decided three important questions under the Trademark

Act which have not been but should be settled by this Court.

Those questions are listed by the petitioner as follows:

1. In deciding whether the accused mark is a 'colorable imitation' of the mark alleged to be infringed, should the court take into consideration the accessories used with the accused mark such as the name of the defendant on the label and the appearance of the label?

2. Is there any basis in law or common knowledge for a finding that people familiar with the trademark alleged to be infringed have knowledge of the identity of the owner thereof and would not be confused by the accused mark unless they thought it indicated the goods of a party of that identity?

3. Is it significant that the defendant's kind of goods would not be mistaken for the plaintiff's kind of goods in a case where the goods of the parties are related but not identically the same?

In support of the statement that the Court of Appeals for the Fourth Circuit has decided the questions propounded above, petitioner lifts from the opinion paragraphs, and portions of paragraphs and asserts that the statements made therein indicate a decision of these questions. Actually the Court of Appeals for the Fourth Circuit decided only one point in this case, and that was that VA and V-8 were not sufficiently similar to constitute either infringement or unfair competition.

At best what petitioner has done is to isolate certain portions of paragraphs, remove them from the context of the main body of the opinion, and argue that new rules have been promulgated.

The result of this has been to distort the true meaning of the lower court.

Nor do we think that these isolated statements are properly or customarily sufficient to warrant the granting of a writ of *certiorari*.

“Emphatically, the use that the court has made of its descretionary jurisdiction on *certiorari* to correct error does not destroy its general rule that it will not grant the writ merely to review evidence and discuss particular facts, nor sanction the view that claim of error may be predicated on points merely ‘lurking in the record’ and not presented or decided below.” “Jurisdiction of the Supreme Court of the United States” Robertson and Kirkham, page 611; *United States v. Johnson*, 268 U. S. 220, 45 S. Ct. 496, 69 Led. 925; *Bingham v. United States* 296 U. S. 211, 56 S. Ct. 180, 80 Led. 160.

However, we shall proceed to discuss each of these questions in the order they were presented in petitioner’s brief.

1. The Court decided that both labels and marks were dissimilar: the discussion of labels in no way disturbed the decision on the marks and was necessary on unfair competition.

Under its heading 1, on page 17 of its brief, petitioner asserts that the court has taken into consideration the accessories used with the accused mark such as the name of the defendant on the label, and the appearance of the label as a whole.

Petitioner quotes a portion of a paragraph from the opinion of the Court of Appeals as follows:

“* * * the letters VA are customarily used as an abbreviation of the name of the state in which the defendant produces and distributes its goods, and when used in connection with the defendant's name, which includes the well known designation of a geographical subdivision of the state, would be understood as indicating the territorial origin of the product * * *” (R. 42)

Petitioner says “the court resorted to the defendant's name, one of the accessories used by the defendant in connection with the accused mark, in order to find that the accused mark conveys a geographical meaning and indicates territorial origin instead of commercial origin.” (p. 17 petitioner's brief)

But there was not the slightest necessity for the court to resort to the name of the defendant company in order to “find that the accused mark conveys a geographical meaning * * *”. The mark VA itself is the well-known abbreviation of the State of Virginia, and this is sufficiently geographic to indicate territorial origin instead of commercial origin.

At most, the reference to the name of the defendant only made more specific the reference to the exact part of Virginia in which the defendant produced and distributed its goods.

If it were error for the court in this case to refer to the name of the company as more specifically indicating the exact geographical origin of the goods, it was harmless error. We do not believe it to be error at all for the reasons we shall hereinafter give.

Petitioner next states that the accused mark must stand on its own feet and be sufficiently different in itself from the petitioner's trademark to avoid confu-

sion.

With this statement we have no quarrel if it is limited to infringement and not applied to unfair competition also.

But we submit that defendant's mark is sufficiently different in itself from petitioner's mark to avoid confusion.

While two courts have carefully examined these marks and decided that they were not confusingly similar, we point out that the lettering of the word VA is in large wide block letters, orange in color. The right prong of the V extends very much further up than the normal V. The V in V-8 is in large narrow letters, black on a green background, without any difference in the length of the prongs.

And in this connection we further comment that the illustrations in petitioner's brief of the two marks are not in color and do not properly convey the striking color differences in the marks themselves. Resort should be made to the exhibits themselves to appreciate the true differences.

On page 18 of its brief, petitioner cites a series of cases holding that the mere fact that a defendant inserts its name on a label does not prevent infringement if the marks are sufficiently alike to otherwise constitute infringement. These cases have no pertinency to the present discussion. The Circuit Court did not base its decision that the marks in the instant case were not confusingly similar on the fact that defendant's name appears on the label, and nowhere in the opinion does it say that its decision was based on this ground.

Petitioner quotes the finding of the District Judge on the marked dissimilarity of both labels and marks used by the two parties in this suit. The Circuit Court

quoted this finding with approval in its opinion (R. 40). Petitioner maintains that since the District Judge has in this finding described the marked differences in the labels, that he is resorting to the accessories to distinguish the marks. The short answer to this would be that both the District and Circuit courts found not only the labels but also the marks themselves totally dissimilar.

But there is another explanation for the references to the labels in the two opinions.

Petitioner brought its actions not only on alleged infringement but also on alleged unfair competition. Paragraphs IV, X and XII of its complaint read as follows: (R. 1 and 3)

"IV. This is an action arising under the trademark laws of the United States, Act of February 20, 1905, for infringement of a trademark registered in accordance with the provisions of the said Act, and also an action for unfair competition.

X. Since a date subsequent to the sale of plaintiff's V-8 Vegetable Juices in the State of Virginia and elsewhere in interstate commerce, defendant has been canning and selling tomato juice and lima beans under the trademark VA in competition with the plaintiff in the State of Virginia and elsewhere in interstate commerce. A specimen of defendant's VA Tomato Juice label is hereto attached and marked "Exhibit B to the complaint" and a specimen of defendant's VA Lima Beans label is hereto attached and marked "Exhibit C to the complaint".

XII. By its acts aforesaid defendant is likely to confuse and deceive purchasers and cause them

to believe that defendant's tomato juice and lima beans come from the same source as V-8 Vegetable Juices; and defendant is infringing plaintiff's trademark V-8 and unfairly competing with the plaintiff." (R. 1-4)

The complaint closed with a demand that defendant be directed to deliver up for destruction any and all labels, containers, etc. (R. 4).

There has never been any amendment of this complaint.

The stipulation of facts, signed by attorneys for both parties, describes this suit as follows:

"This is a civil action for trademark infringement and unfair competition * * *" (R. 10)

While it is true that in its brief in the Circuit Court and in its petition for *certiorari* petitioner stated, for purposes of its own argument, that the only unfair competition involved was infringement, yet it did not so limit the charge of unfair competition in its pleading, and even if it had the situation would not have been changed. The charge of unfair competition would still have been before the court necessitating the consideration of all of the circumstances including the labels in a determination as to whether unfair competition existed. This court had before it a similar situation in the case of *Coats v. Merrick Thread Company*, 149 U. S. 563, 37 Led. 847, where the unfair competition alleged consisted of infringement. Nevertheless this court carefully considered the labels and other accessories in disposing both of infringement and unfair competition.

It is well settled that there must be a consideration of labels in determining the issue of unfair competition.

"The rule that labels and packages play no part in the determination of trade-mark infringement has had wide acceptance but its application is not always clear. The confusion probably is due to the close relationship of trade-mark infringement to unfair competition. A large percentage of actions for trade-mark infringement include causes of action for unfair competition. Usually, also, the issues of trade-mark infringement and of unfair competition are so closely allied that their separate discussion is difficult and unnecessary. A decision in such a case may read as though all the facts were determinative of both issues, as though evidence with regard to labels and packages had entered into the decision of the question of technical trade-mark infringement." Vol. 1 *Nim's Unfair Competition and Trademark*, 4th Ed. bottom p. 719.

In *M. C. Peters Mill Co. v. International Feed No. 2 Co.* (CCA6) 262 F. 336, 339, the court said: —

"As a general rule, the right to recover upon either of these causes of action depends, substantially, upon the same state of facts, excepting, of course, the statutory provisions applying to trade-marks, and excepting also, that in disposing of the question of unfair competition, a court should take into consideration the dress, combination of colors, and manner and method of application and use of the respective marks."

We, therefore, respectfully submit that the court in this case has decided that the marks themselves are so dissimilar as not to infringe; that the discussion of the

dissimilarity of the labels has in no way disturbed the conclusion; that a discussion of the labels is pertinent in regard to unfair competition, which petitioner has itself injected into this action.

2. The Circuit Court did not decide that people familiar with the trademark V-8 would have knowledge of the identity of its owner.

Petitioner takes the last clause from an excerpt from the opinion and places an interpretation thereon which the Circuit Court did not intend and which does not follow at all when the whole context is considered. The excerpt reads as follows:

“* * * the letters VA are customarily used as an abbreviation of the name of the state in which the defendant produces and distributes its goods, and when used in connection with defendant's name, which includes the well-known designation of a geographical subdivision of the state, would be understood as indicating the territorial origin of the product *rather than the goods of a corporation of nationwide fame.*” (R. 42) (1)

Petitioner says that the reference to Standard Brands as a “corporation of nationwide fame” is a finding that people familiar with V-8 have knowledge of the identity of the owner of the trademark V-8.

But this is not even what the court was discussing. It was merely emphasizing that VA was an abbreviation of a state name, a geographical term and that to the average purchaser it indicated that the product came from Virginia, and did not indicate that it was a product of Standard Brands or of any other corporation of na-

tionwide fame.

It was a simple assertion that VA was a term geographical in nature without any indication that it connoted a product of any particular corporation. For the phrase "a corporation of nationwide fame" might have been substituted the words "any particular corporation" and the meaning might have been clearer.

Petitioner here has simply misunderstood the meaning of the court. There is no basis for the claim that the court here has decided an important question upon which there is authority to the contrary.

3. The Court of Appeals for the Fourth Circuit fully recognized that an owner of a trademark is entitled to protection as to source.

Petitioner attempts in its argument, beginning on page 23 of its brief, to infer that the Court of Appeals for the Fourth Circuit did not recognize the well known law that a trademark owner is entitled not only to protection from a confusion of goods but also to protection as to source or origin of the goods.

Perhaps the best answer we can give to this contention is to refer again to the clear statement in the opinion of the Circuit Court recognizing this principle of Trademark law (R. 42).

Not only did the Circuit Court have it in mind but the District Court also clearly appreciated it. It said in its opinion after discussing the dissimilarities of both the labels and marks

"The difference in appearance is such as to offer no suggestion that the products to which they are attached are from the same source or are put up by the same packer". (R. 25).

It is, of course, true that since the instant suit involved both infringement and unfair competition, both the District and Circuit Courts discussed the difference in products at considerable length. The use to which the respective marks have been put is vital in determining unfair competition.

Petitioner cites the case of *Mishawaka Co. v. Kresge Co.*, 316 U. S. 203, on page 25 of its brief to sustain its position that in that case no opinion had been expressed by the court on the question as to the materiality of confusion of products in determining likelihood as to confusion of source or origin.

That case graphically illustrates why a writ of *certiorari* should not be granted in the instant case.

There a writ was granted by this Court from the Sixth Circuit. The writ was requested on two grounds. First the petitioner complained that full relief had not been given it on the question of infringement. The lower courts had determined that petitioner was entitled to an injunction and damages on account of the use of a mark consisting of a red rubber ball imbedded in a rubber heel. But relief was denied the petitioner for the alleged infringement by the use of other discs in various forms and designs in the rubber heels. Petitioner claimed infringement as to these other marks and in its petition asked the consideration of this point by this court.

Secondly, it asked a writ on the ground that even as to the infringement which the lower courts had held to exist, the proper method of accounting to determine damages had not been followed by the Circuit Court.

This Court granted the writ solely on the accounting question but flatly refused it on the infringement question saying that that question was not open in this

Court (86 Led. 1384; 316 U. S. 205).

A reading of the opinion of the Sixth Circuit, reported in 119 Fed. (2d) 316, shows that many of the same questions on infringement now relied upon in the instant case for the granting of a writ were concerned there. Yet the Court there refused a writ on these same questions.

That case like the instant case concerned a suit for infringement and unfair competition; and in that case, as in the instant case, there was a discussion of the effect of a difference in the goods upon the likelihood of confusion; and of the dissimilarities of the labels; and, in that case as in the instant case, the court held that there was no sufficient similarity in either the labels or trademarks to constitute either infringement or unfair competition.

We submit that petitioner's own authority, cited by it on other points, shows that no writ should be granted in the instant case.

III. The Conclusion that Defendant's Goods Would Be Asked for as "Virginia Tomato Juice" or "Virginia Lima Beans" Is Sound and Logical.

Petitioner argued vainly in both lower courts that the mark VA would be pronounced by a prospective purchaser "Vee-ay", and not "Virginia", for which the letters VA are the well-known State abbreviation.

Only on the assumption that the mark is pronounced "Vee-ay" could there be the slightest claim of phonetic similarity. If it be pronounced "Virginia", as we have contended, there can be no phonetic similarity — and added to the lack of similarity of appearance and meaning, would be a dissimilarity in sound.

Yet petitioner in the lower courts on this point so vital to his case, produced not a word of evidence. Petitioner excuses this weakness by saying that the facts were stipulated to save expense. But that did not prevent the introduction of evidence on the point, if there were any such evidence. The burden certainly rested on the petitioner, and not on this respondent to produce this evidence.

To us it seems perfectly clear that to the ordinary purchaser the abbreviation "VA" means Virginia. He would not normally pronounce it "V-ay" accentuating the separate letters. He would pronounce it "Virginia" just as he would pronounce "MD" as "Maryland", not "MD", which might connote a medical degree. So also with any State abbreviation, such as "GA" for "Georgia", "CAL" for "California".

The situation is quite different in regard to the "VA" mark where one letter follows another without any sign of hesitation or separation, and that which exists in regard to the "V-8" mark where the connecting mark very definitely requires the pronunciation separately of the letter and numeral.

But petitioner says that the mark pronounced "Virginia" would be quite valueless to this respondent. That conclusion does not follow. As pointed out by the District Court (R. 22) practically all of defendant's marks are geographical, either referring to Virginia or to Eastern Shore in one form or another. Yet these marks, although indicating mere geographical locations, have proved quite satisfactory to the petitioner.

IV. Conclusion.

This case has been decided by two lower courts in

favor of the respondent. While the facts were stipulated, yet the vital question as to confusing similarity of the two marks was in itself largely a question of fact.

Of course, the jurisdiction of this Court is largely discretionary. Yet, it is submitted, due consideration should be given to the fact that petitioner has received two full trials of its contentions, and that two courts have concurred in rejecting them. *Houston Oil Co. of Texas v. Goodrich*, 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385.

Then, too, in the last analysis the writ is granted in non-conflict cases, such as the instant case, on the ground of importance. The instant case presents no novel or important questions. It is a simple, run-of-the-mine trademark case where two courts using their best judgment have decided there is no confusing similarity, in the respective marks, a conclusion with which petitioner simply does not agree.

We respectfully ask that the writ be denied.

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